

# 2014 Appellate Update for Law Enforcement

(Published Opinions)



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# **Fourth Amendment Search & Seizure**

# Search Warrants

*Bailey v. United States*, 133 S.Ct.1031, 568 US \_\_\_\_ (2013)

- Ability to detain occupants of a premises subject to a search warrant is limited to occupants within the immediate vicinity of the premises to be searched.
- Factors:
  - Lawful limits of premises;
  - Whether occupant was in line of sight of premises;
  - Ease of reentry from occupant's location.

# Consent Searches

*Fernandez v. California*, 134 S.Ct. 1126, 571 US \_\_\_\_ (2014)

- Police could conduct warrantless search of defendant's apartment following his arrest based on consent of other occupant.
- Did not matter that defendant had previously objected to the search and was absent at the time consent was given.

# Probable Cause to Search; Drug Dog

*Florida v. Harris, 133 S.Ct. 1050, 568 US \_\_ (2013)*

- To establish a drug dog's reliability, the state need not present an exhaustive set of records.
- Evidence of the dog's training and certification proficiency allows the court, subject to conflicting evidence, to determine that the dog's alert provided PC to search.

# Reasonable Suspicion; Anonymous 911 Call

*Navarette v. California*, 134 S.Ct 896, \_\_ US\_\_ (2014)

- In a 5-4 decision, the Court found that an anonymous 911 call provided officers with reasonable suspicion to stop a vehicle.
- Factors:
  - Caller claimed eye-witness knowledge.
  - Police could corroborate caller's location.
  - 911 call system safeguards against false reports.
  - Call information provided reasonable suspicion that defendant was driving drunk.

# Determining When a Seizure Occurred

*U.S. v. Black, 707 F.3d 531 (4<sup>th</sup> Cir. 2013)*

- Court determined defendant was seized when officer pinned suspect's I.D. card to his uniform.
- Factors to consider to determine seizure:
  - Number of police officers present;
  - Whether police officers were in uniform;
  - Whether police officers displayed weapons;
  - Whether officers touched defendant or attempted to restrain his movements;
  - Use of language or tone that would compel compliance;
  - Whether defendant was informed of suspicion of criminal activity;
  - Whether officer promptly returned I.D. card.

# Reasonable Period of Detention; Drug Dog

*U.S. v. Green, 740 F. 3d 275 (4<sup>th</sup> Cir. 2014)*

- 14 minute period of detention between traffic stop and alert by drug-detection dog was reasonable because officer was performing record check and other functions.
- Also, drug dog was sufficiently reliable to sustain search based on dog's controlled testing results and dog's success rate involving drugs in vehicles.



# Unreasonable Detention; 4<sup>th</sup> Amendment

*U.S. v. Watson, 703 F.3d 684 (4<sup>th</sup> Cir. 2013)*

- Defendant's 4<sup>th</sup> Amendment rights were violated when:
  - He was detained for 3 hours while a search warrant was obtained; and
  - Police had no reason to believe he was linked to criminal activity; and
  - Detention was not justified by need to preserve evidence; and
  - Detention was not justified by concern for officer safety.

# Probable Cause to Stop Vehicle

*U.S. v. Williams, 740 F.3d 308 (4<sup>th</sup> Cir. 2014)*

- Officer had probable cause to stop defendant because his vehicle was stopped in the middle of a residential street, impeding traffic flow.
- The court rejected the defendant's argument that the officer lacked probable cause because he cited the wrong traffic code section.
- Probable cause was deemed sufficient because the defendant's conduct was prohibited by another similar statute.

# Establishing Exigent Circumstances

*U.S. v. Yengel, 711 F.3d 392 (4<sup>th</sup> Cir. 2013)*

- Court held that officers did not have a reasonable belief of exigent circumstances.
- Factors to be considered:
  - Degree of urgency and time necessary to get warrant;
  - Officers' reasonable belief that contraband is about to be removed or destroyed;
  - Possibility of danger to officers guarding site;
  - Suspect's awareness of police interest;
  - Ready destructibility of contraband.

## Inventory Search Reasonable

*Fauntleroy v. Commonwealth*, 62 Va. App. 238, 746 S.E.2d 65 (2013)

- Officer's decision to impound vehicle was reasonable because the vehicle was not driveable because of invalid inspection sticker.
- Officer was not required to ask defendant if he wished his vehicle moved to another location before impounding it.
- Subsequent inventory search yielding drugs objectively reasonable under 4<sup>th</sup> Amendment.

# Scope of Search Warrants

*Jeffers v. Commonwealth*, 62 Va. App. 151, 743 S.E.2d 289 (2013)

- In child porn investigation, police traced an IP address to a residence and obtained a search warrant for the property. Suspect computer was located in a barn on the property.
- The court held that critical element is reasonable belief that the specific things to be searched for are located on the property to which entry is sought.
- Police were not required to stop search because they discovered someone living in the barn.

# Suspicionless Search of Probationer

*Murry v. Commonwealth*, 62 Va. App. 179, 743 S.E.2d 302 (2013)

- Defendant was convicted of rape and 5 counts of sexual battery against stepdaughter.
- After release from incarceration, trial court ordered defendant to be subject to suspicionless searches for entirety of suspended sentence.
- Court of Appeals held that this was reasonable in view of his convictions and need for increased supervision upon release from incarceration.

# Reasonable Expectation of Privacy

*Rideout v. Commonwealth*, 62 Va. App. 779, 753 S.E.2d 595 (2014)

- Police traced child porn from file-sharing program back to defendant's IP address.
- Defendant claimed he had set up the file-sharing software to prevent outside access.
- Court of Appeals held that defendant had no reasonable expectation of privacy when he had installed and used software specifically designed for sharing files over the internet.
- Police acted properly in obtaining files from his computer.

# Warrantless Entry Violated 4<sup>th</sup> Amendment; No Exigent Circumstances

*Ross v. Commonwealth, 61 Va. App. 752, 739 S.E.2d 910 (2013)*

- Defendant would not allow social worker entry for a ‘surprise’ home study.
- Police officer observed defendant run into home, but saw no criminal act.
- Court of Appeals held that officer violated defendant’s 4<sup>th</sup> Amendment rights when he entered the home, handcuffed defendant and seized marijuana and firearms.
- There was no emergency or danger to officer or social worker.





# **Fifth Amendment Confessions & Self-incrimination**

# Defendant's Silence; 5<sup>th</sup> Amendment

*Salinas v. Texas, 133 S.Ct. 2174 (2013)*

- A witness who desires privilege against self-incrimination must claim it.
- 5<sup>th</sup> Amendment did not prohibit prosecution from commenting on defendant's silence in response to non-custodial questioning.

# Voluntary Statement While in Custody

*U.S. v. Johnson, 734 F.3d 270 (4<sup>th</sup> Cir. 2013)*

- While in custody on a misdemeanor and before *Miranda* warnings, defendant voluntarily stated that he had information that could help officer.
- Officer responded, “What do you mean?”
- Defendant said he could get officers a gun.
- Court held:
  - Officer’s question was not an unwarned interrogation;
  - A reasonable officer would not expect defendant to “extricate himself from a misdemeanor by implicating himself in a felony.”

# Custodial Interrogation

*U. S. v. Hashime, 734 F.3d 278 (4<sup>th</sup> Cir. 2013)*

- Multiple officers executed a search warrant at defendant's residence looking for child porn.
- Defendant was pulled from his bed, separated from his family and placed in a basement storage room where he was guarded and interrogated for 3 hours.
- Despite being told he was not under arrest and was free to leave, court held that defendant was in custody for purposes of *Miranda*.
- Under the totality of the circumstances, a reasonable person would not feel free to leave.

# Voluntariness of Confession by Juvenile

*Robinson v. Commonwealth,*  
April 29, 2014, \_\_\_\_ Va. App. \_\_\_\_ (2014)

- 15 y.o. arrested for robbery and *Mirandized*.
- Defendant waived rights but during interview asked for his mother. Detective refused because defendant had previously been certified and was a “man” now. Defendant confessed.
- Court ruled the request for parent did not render statement involuntary.
- Even though defendant was not legally an adult, the court found his previous experience with the criminal justice system to be significant.



# **Crimes Against the Person**

## **Intent to Maliciously Wound; One Punch**

*Burkeen v. Commonwealth, 286 Va. 225, 749 S.E.2d 172 (2013)*

- An assault with a bare fist may be committed with such violence and brutality that an intent to kill may be presumed.
- Defendant landed a single punch to victim's head after bragging about his strength and training. Defendant continued to taunt victim after the blow.
- Victim suffered multiple facial fractures requiring major reconstructive surgery.
- Court can look at method of wounding and the surrounding circumstances.

# Strangulation; Proving Bodily Injury

*Dawson v. Commonwealth*, May 27, 2014, \_\_\_\_ Va. App. \_\_\_\_ (2014)

- Court held that ‘bodily injury’ in strangulation has same meaning as in felony assault cases.
- Bodily injury means “any bodily hurt whatsoever” and does not require observable wounds, cuts, breaking of skin, broken bones or bruises.
- Injury need only be some detriment, hurt, loss or impairment as described by victim.



# Strangulation; Proving Bodily Injury

*Moore v. Commonwealth, May 8, 2014, unpublished*

- Court held that ‘bodily injury’ in strangulation has same meaning as in felony assault cases.
- Bodily injury includes any bodily hurt, including soft tissue injuries and swelling.
- Does not require proof of medical attention or residual effects.

# **Crimes Against Property/Fraud**

# Construction Fraud; Failure to Perform

*Dennos v. Commonwealth*, \_\_\_\_ Va. App. \_\_\_\_ (2014)

- Defendant took payment to fix victim's roof.
- Defendant never returned to the residence or did any work. He never responded to victim's numerous phone calls.
- Victim discovered defendant's address vacant.
- Victim discovered roof did not even need repair.
- Evidence found sufficient to prove construction fraud.

# Embezzlement; Proof

*Leftwich v. Commonwealth,*  
61 Va. App. 422, 737 S.E.2d 42 (2013)

- Defendant diverted a check belonging to her employer into her personal account.
- Embezzlement established simply by the defendant's wrongful and fraudulent taking of money intended for her employer.
- She appropriated for her own use, with the intent to permanently deprive the owner thereof, property entrusted to her through the course of her employment.

# **Drug & Gun Offenses**

# Distribution of Imitation Controlled Substance

*Powell v. Commonwealth, 62 Va. App. 579 (2013)*

- Using common street language, officer attempted to purchase crack cocaine. Instead, defendant sold quetiapine, a Schedule VI white rock substance, contained in a knotted baggie.
- Court found substance appearance, packaging and defendant's statement sufficient for guilt.
- Commonwealth also proved that the substance was not a 'controlled substance subject to abuse' because it was Schedule VI drug.

# Concealed Weapon; Unlocked Glove Box

*Doulgerakis v. Commonwealth,*  
61 Va. App. 417, 737 S.E.2d 40 (2013)

- A handgun kept in an unlocked, but latched, glove box was “secured in a container or compartment” within the meaning of the statutory exception to the concealed weapon statute.
- Glove box need not be locked for exemption to apply.

# Possession of a Firearm by Felon

*Barlow v. Commonwealth*, 61 Va. App. 668, 739 S.E.2d 269 (2013)

- Responding to a shots fired complaint, officer saw defendant remove object from waistband and attempt to flee. Defendant found under parked car with pistol nearby.
- Pistol was rusty and the barrel was missing (later found nearby).
- Court found no evidence that pistol was in such a state of disrepair as to lose its character of being a firearm by definition.



## Use of Firearm in Burglary

*Smith v. Commonwealth, 61 Va. App. 690, 739 S.E.2d 280 (2013)*

- Defendant entered victim's home with gun by his side.
- When victim began to scream, he held gun to her head and told her to be quiet.
- Evidence found sufficient to convict of use of a firearm in the commission of a burglary, even though defendant did not use the gun to gain entry.
- Use of gun to subdue victim was sufficient.

# Concealed Weapon; Curtilage Exception

*Foley v. Commonwealth*, \_\_\_\_ Va. App. \_\_\_\_ (2014)

- Defendant found on dirt road in front of his house carrying a concealed weapon.
- Court rejected his argument that this fell under the 18.2-308 (B) home curtilage exception.
- Defendant did not meet burden of proving that the area where he was found was an extension of the home and was habitually used for family purposes and for “carrying on domestic employment.”
- Court distinguished this definition of “curtilage” from that used in 4<sup>th</sup> Amendment law.

# **DUI/Habitual Offender**

# Refusal

*D'Amico v. Commonwealth,*  
\_\_\_ Va. App. \_\_\_, 754 S.E.2d 291 (2014)

- Court rejected the argument that arresting officer must read the “Declaration of Refusal” form to defendant.
- § 18.2-268.3 (A) sets forth elements of the offense. Procedural sections (B) and (C) do not add elements to the offense.
- Evidence established that the defendant gave an insufficient reason to refuse the breath test.

# Operation of Vehicle; Private Driveway

*Sarafin v. Commonwealth*, 62 Va. App. 385, 748 S.E.2d 641 (2013)

- Defendant found intoxicated and asleep in vehicle in his driveway. Key was in auxiliary position and radio on.
- Court held Code draws no distinction between public highway and private property for purposes of DUI.
- “Operator” is any person who drives or is in actual physical control of vehicle.
- Commonwealth did not need to prove that defendant intended to drive the vehicle.
- Note: Case on appeal to Virginia Supreme Court.
- *See also: Enriquez v. Commonwealth* (2012).

# Operation of Vehicle; Key in Ignition

*Enriquez v. Commonwealth*, 283 Va. 511, 722 S.E.2d 252 (2012)

- Court established rule that when an intoxicated person is behind the wheel on a public highway and the key is in the ignition, he is in actual physical control of the vehicle, and therefore, guilty of DUI within the meaning of § 18.2-266.
- The position of the key in the ignition switch is not determinative.

# Blood test for DUI

*Patterson v. Commonwealth,*  
62 Va. App. 488, 749 S.E.2d 538 (2013)

- Officer arrested defendant for DUI and offered him a blood test, even though a breath test was available.
- Defendant did not smell of alcohol although he was visibly impaired. Arrest report notes “DUI – drugs.”
- Lab only tested for alcohol – result .16.
- Court denied defendant’s motion to suppress Certificate of Analysis, holding that § 18.2-268.2(C), not (B), is controlling.

# DUI; Sufficiency of the Evidence

*Case v. Commonwealth, 63 Va. App. 14, 753 S.E.2d 860 (2014)*

- Civilian called police because defendant was passed out behind wheel with foot on the brake and vehicle in gear.
- Court held that:
  - The CA did not have to disprove possibility that someone moved defendant from the passenger seat;
  - Defendant was legally responsible even though he was unconscious (intoxication is not a defense);
  - The CA did not have to prove that defendant intended to operate a vehicle.



# Indecent Exposure

# Indecent Exposure; Definition of Public Place

*Barnes v. Commonwealth, 61 Va. App. 495, 737 S.E.2d 919(2013)*

- Defendant, a jail inmate, masturbated while standing at the bars of his first floor cell, in open view of inmates, staff and authorized members of the public.
- Court affirmed conviction and defined a public place as:
  - A place with no expectation of privacy, and
  - A place with foreseeable non-consenting public witnesses.

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